union did not reach the correct interpretation of a collective agreement . . . – was "inartful, unskillful, or erroneous" in contract analysis . . . – would not endow the grieving employee . . . with a right to correction at the hands of a court. The distinction often to be observed is "between honest, mistaken conduct, . . . on the one hand, and deliberate and severely hostile and irrational treatment on the other."

Petitioner also cites *DeArroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO*, 425 F. 2d 281 (1st Cir. 1970), for a breach of duty of fair representation in Union's failure to discern an obvious basis under the contract for pressing claims. This case is about seven telephone operators who were wrongfully discharged by their employer and whose union dismissed their grievances. The Court concluded that the union's failure to press plaintiffs' grievances was the result of its arbitrary and perfunctory handling of them and this is a breach of its duty of fair representation preventing an exhaustion of contractual remedies and enabling these . . . plaintiffs to maintain their suit against the company.

Once again, this case can be distinguished from the case at bar because these plaintiffs were actual employees of a company who had requested their union to file a grievance. Further, in the *DeArroyo* case only the union could bring a grievance, whereas in the case at bar, the Petitioner, even though she didn't ask the Union to file a grievance, could have filed a grievance on her own behalf.

As regards the alleged breach of duty of representation, the Massachusetts Appeals Court said: "[Petitioner's] claim that the union breached the duty of fair representation in refusing to pursue her complaint of not being

named Lazaris's successor fails (even if she was a member of the bargaining unit) because she has demonstrated no reasonable expectation of proving that the union's conduct was "arbitrary, discriminatory, or in bad faith" or "perfunctory or demonstrative of inexcusable neglect," *Graham v. Quincy Food Serv., Employees Assn. & Hosp., Library & Pub. Employees Union*, 407 Mass. 601, 606 (1990) (citations omitted) as contrasted with a reasonable, good faith assessment that her grievances lacked merit. See id. at 609. See also *Cappellano v. Massachusetts Bay Transp. Auth.*, 38 Mass. App. Ct. 231, 235 (1995). Cf. *National Assn. of Govt. Employees v. Labor Relations Commn.*, 38 Mass. App. Ct. 611, 613 (1995), in which the plaintiff was simply ignored"

CONSPIRACY

Petitioner states in her petition that her petition limits her focus to Counts I through III, Petitioner states in footnote 3 on page four of her petition: "Count III states a claim for conspiracy. The only direct evidence relates to the letter documenting a meeting between these parties where the issue of termination of a substitute to impair seniority rights was raised. While Petitioners do not expressly waive this issue, argument is confined to Counts I and II."

The so-called direct evidence described in the footnote is merely a letter from Gauvain to the school principal summarizing a meeting between them which requests a confirmation or clarification from the school principal about the use of day-to-day substitutes and the removal of long term substitutes from assignments at LVTI, see AP.

114. This hardly rises to the level of evidence required to constitute a conspiracy.

As the Respondents indicated in their Motion for Summary Judgment, the Petitioner had not adduced any material facts against them that would support a claim for conspiracy against the Union or Gauvain. Nor did the Petitioner set forth any facts in the Statement of Facts in her brief submitted to the Massachusetts Appeals Court which would support a claim for Conspiracy against the Union or Gauvain. Although Petitioner's counsel indicated on page eight of that brief [Petitioner's] that alleged "destruction of [petitioner's] seniority . . . is not merely documented by Ms. Whyte's Affidavit . . . "

This Affidavit of Ms. Whyte, the Department Head, which was produced on the day of the hearing on the Motion for Summary Judgment does not mention Gauvain or the Union in any one of the twenty-one paragraphs contained in her affidavit.

In order to establish a claim for civil conspiracy, the Petitioner must show that there was a common design or an agreement, . . . between two or more persons to do a wrongful act and there must be proof of the same tortious act in furtherance of the agreement. *Aetna Casualty Surety Company v. P&B Autobody, et al.*, 43 F. 3d 1546 (1994).

Similarly, in *John F. Fleming v. Ernest B. Dane & others*, 304 Mass. 46, 49 (1939), the Court stated that the coercive power resided in only two individuals and that power consisted in nothing more than the power to make decisions as to foreclosures by a bank. Neither Gauvain nor the Union had any coercive power over the Petitioner as stated above. They neither had the authority to hire or

terminate the Petitioner nor did the Petitioner ever request them to file a grievance of her behalf.

With respect to this claim for conspiracy, the Massachusetts Appeals Court said: "Count III (Civil Conspiracy and wrongful termination): [Petitioner's] bare and conclusory allegations of a grandiose plot and cover-up to prevent her hiring cannot survive summary judgment. [Petitioner] has failed to show a reasonable expectation of proving that any defendants acted in concert to unlawfully deprive her of employment."

Further, the United States District Court for the District of Massachusetts stated: Under Massachusetts law, civil conspiracy is a "very limited cause of action." (Emphasis provided). In order to state such a claim, plaintiff must allege that defendants had some "peculiar power of coercion" over the plaintiff that they would not have had if they had been acting independently. Evidence of mere joint tortious activity by the defendants is insufficient to prove civil conspiracy. See *Milford Power Limited Partnership, by its General Partner Milford Power Associates, Inc. Plaintiff and Defendant-in-Counterclaim, v. New England Power Company, Defendant and Plaintiff-in-Counterclaim, v. Enron Corp., Enron Power Marketing, Inc., Jones Capital Corp., and Jones Medway, Inc., Additional Defendants-in-Counterclaim*, 918 F. Supp. 471 (1996). In the case at bar, there was not even evidence of joint tortious activity.

SUMMARY

In summary, the Petitioner never requested Gauvain or the Union to file a grievance on her behalf; although,

unlike the plaintiffs in the *DeArroyo* case, she could have filed a grievance on her own but she failed to do so. It is uncontroverted that neither Gauvain nor the Union had authority to hire or terminate Petitioner's employment with the Lynn School Department. Since there was no request for a grievance and, no evidence of discrimination or bad faith by Gauvain or the Union the claim of breach of duty of fair representation should fail. Finally, as the Appeals Court said: "[Petitioner] has failed to show a reasonable expectation of proving that any defendants acted in concert to unlawfully deprive her of employment."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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